Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HARRY GOLDGAR, Petitioner

v.

OFFICE OF ADMINISTRATION,
EXECUTIVE OFFICE OF THE PRESIDENT, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HARRY GOLDGAR,
Counsel of Record
8237 Panola Street
New Orleans, Louisiana 70118-2926
Tel. 504+866-2528
ATTORNEY FOR PETITIONER

October, 1994

QUESTIONS PRESENTED

The *underlying* question presented here is whether a *telepath*, i.e., a person whose mental processes are transparent to anyone, anywhere, at any time, who wishes to read them — a condition Petitioner shares with such eminent figures of the past as Edgar Allan Poe and W.B. Yeats — and who is in good standing in his community, is entitled, under the Constitution and laws of the United States, to equal protection, justice in the courts, knowledge of the facts of his peculiar identity and of his life history, and all other rights, civil and human, to which citizens of the United States are normally entitled.

The *specific* questions presented are as follows:

1. Whether the refusal of authorities of the government to disclose to a citizen the identity of a governmental entity which conducts a therapeutic project concerning him violates the U.S. Constitution, Amendment I, specifying the right to petition the government for a redress of grievances.

2. Whether, since there appears to be no precedent for addressing requests directly to the President under the Freedom of Information Act (FOIA), but the President does maintain an Executive Office, and within it an Office of Administration to support and advise him in carrying out his duties, and has designated a person within *that* office to be "FOIA Officer," the jurisdictional requirements of FOIA are satisfied when a citizen seeking public information in the possession of the President requests the information from that FOIA officer.

3. Whether an FOIA suit for an order to produce a one-sentence statement of the name, address, and telephone number of a federal entity, and the name of the director of a

project conducted by that entity, may legitimately be denied jurisdiction in the federal courts because it does not ask for "records."

4. Whether, when a request to a District Court to order production, under FOIA, of information denied by a government agency is dismissed as not meeting jurisdictional requirements, the plaintiff may sue, *three years later*, after having corrected errors committed in the first action, a *different* defendant requesting *different* information, and may expect the new suit to be heard on its merits, without its being conflated by the District Court *and* the Court of Appeals with the previous suit.

5. Whether, when information requested of a government agency under FOIA, plainly stated in the citizen's complaint in a U.S. District Court, and repeatedly re-defined in subsequent pleadings, is wrongly cited in the agency's denial and in every ruling by *every officer of the District Court and the Court of Appeals*, so as to appear, most injuriously to his case, to be a request for *nonexistent* information, the citizen has had a fair hearing and the denial of his request should be affirmed.

PARTIES TO THE PROCEEDING

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No.

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October Term, 1994
HARRY GOLDGAR, Petitioner
v.
OFFICE OF ADMINISTRATION,
EXECUTIVE OFFICE OF THE PRESIDENT, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Harry Goldgar, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

Petitioner's original complaint in the U.S. District Court for the Eastern District of Louisiana (Civ.A. No. 93-1402), his appeal to the U.S. Court of Appeals for the Fifth Circuit (No. 93-3796), and all pleadings relating to these actions, were submitted *pro se*. He now petitions this Court for a writ of certiorari in his quality as an attorney and a member of the bar of this Court, acting on his own behalf.

OPINIONS BELOW

The decision of the District Court (Memorandum and Order granting Defendant's motion to dismiss) is not

reported; it is reproduced here as Appendix B. The Magistrate's Report and Recommendation of dismissal, not reported, is reproduced as Appendix C. The decision of the Court of Appeals (Appendix A), and its denial of rehearing (Appendix D), are reported at 26 F3rd 32 (5th Cir.1994).

BASIS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on 18 July 1994 (Appendix A). A timely petition for rehearing (Appendix D) was denied on 1 August 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The applicable sections of the U.S. Constitution and of the statutes and regulations involved are set forth in Appendix E. They are:

U.S. Constitution, Amendment I.

5 U.S.C. § 552 (Freedom of Information Act)

5 CFR Ch. XV (1-1-94 Edition), Part 2502 (Office of Administration, Executive Office of the President, "Availability of Records," Subpart B).

STATEMENT OF THE CASE

Petitioner, age 73, is a telepath: he has an innate condition of thought transparency, enabling any person anywhere at any time who so chooses to read his mind. Early in life, as one whose mental processes could be studied because in him they were transparent, he came under observation and therapy by a U.S. government agency. Thought transparency cannot be cured or treated; therapists

have made use of that condition, however, as a basis for outpatient psychological treatment in which the public, wherever possible, has collaborated. The goal of the project appears to be to determine whether a telepath, when cured of psychological problems and made aware of his thought transparency, can adjust comfortably to living in full awareness of his peculiar condition.

According to universal myth, however, a telepath cannot know of his condition, or, if he learns of it, cannot endure to have it acknowledged or discussed, because he "couldn't live with it." Therefore, no one has ever acknowledged, to Petitioner, his thought transparency or the therapeutic project based upon it. Petitioner understands that this denial of reality used to be necessary so that therapy could proceed. The therapy, however, has long since succeeded, in his recovery from any mental dysfunction and his comfortable adjustment to his thought transparency condition. As a sane, rational, emotionally stable citizen he does not require treatment or "support." Yet, inexplicably, he is forced to labor still under the obsolete myth that no one can talk to him about the facts of his life.

Petitioner has no appeal from this limbo, because, although it is clear, from his lifetime's experience, that the project is a U.S. government endeavor, he does not know who is in charge. Every patient's right to essential information about his case — the diagnosis, the identity of the physician in charge, the sponsoring agency, the prospect of release — is denied him. He seeks to know the name of the U.S. government entity which conducts his treatment, so that he can plead his case for release. That is *all* he seeks to learn in this suit. So he turns to the Freedom of Information Act to obtain that knowledge.

Over a year and a half ago (1 February 1993), Petitioner wrote the President, as chief officer of government, citing FOIA, requesting this information known to the entire citizenry except himself. The President has never replied. He then sought the information from the FOIA officer in the President's executive/ administrative office. This office claims to have no such knowledge, although anyone who knows what is happening in the world could immediately impart it. His appeal to the deputy director of that office was equally denied. The U.S. District Court has refused to order the disclosure of the information; the Court of Appeals has now affirmed that refusal.

Instead, Petitioner's effort through FOIA to discover, or at least to have his guesses about it confirmed, *who he is*, and *what has been going on concerning him* for half a century or more, and *why* it is still going on — to find someone who will *talk* to him about these urgent questions before he is overtaken by death — has been met with a barrage of technicalities, charges of "harassing the Court" and of filing "frivolous" suits, claims that he is duplicating pleadings already decided, persistent misreadings or distortions of the plainly stated information which Petitioner is seeking, and "warnings" and "sanctions" against any future attempt to discover, through the federal judicial system, the identity of the agency conducting this project — all designed, apparently, to preserve, by the immense authority of government, the hoary myth that "We can't admit to a telepath that he is a telepath."

Therefore, Petitioner respectfully seeks from this Court an order for production of the information described.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER THE GOVERNMENT, CONSISTENT WITH THE CONSTITUTION, CAN DENY INFORMATION KNOWN TO VIRTUALLY THE WHOLE PUBLIC TO A CITIZEN WHO REQUIRES THE INFORMATION IN ORDER TO REDRESS A GRIEVANCE AGAINST THE GOVERNMENT.

Petitioner has sought to learn from Respondent, the government agency which sits, as it were, at the right hand of the President, i.e., the Office of Administration in his Executive Office, which certainly has at its fingertips the names and addresses of all government departments and agencies (cf. *United States Government Manual*, Office of the Federal Register, National Archives and Records Administration, 1993/94 edition, p. 105: "The services provided [by this office] include information, personnel..., library services; records maintenance...," etc.) the identity of the particular government entity which conducts a psychological project concerning *him*. Access to this information has been refused by Respondent and by federal District and Appeals Courts. Thus Petitioner has been denied, and seeks in this Court, "redress" of a "grievance" against the Government within the meaning and import of the First Amendment to the Constitution, which, in specifying that "Congress shall make no law" opposing it, assures the right to petition for such redress.

Petitioner's grievance does not come about because he has been for most of his life, and remains, the subject of a government psychological project, for, insofar as he can guess while refused a scintilla of information about it, the project has substantially contributed to the sum of human

knowledge, and thus is an endeavor with which he is proud to be associated. His grievance is that he is denied the merest scrap of information *about* this project: when it began and when (if ever) it will be concluded, when its governors will be willing to talk to him about it and explain its ramifications, by what authority (executive order? Act of Congress?) it is conducted, etc.

The constitutional issue in this regard is suggested in an opinion of Justice Brandeis in a wire-tapping case of nearly 70 years ago (Olmstead et al. v. United States, 277 U.S. 438 (1927)): "Ways may some day be developed by which the government, without removing papers from secret drawers, can produce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts, and emotions.... Can it be that the Constitution affords no protection against such invasions of individual security?"

Or can it be that, when the "invasions" have already been in progress for some decades, the Constitution affords no protection to the person "invaded," who wishes to make the acquaintance of his "invaders" and to learn all about their project?

2. THE PRESIDENT APPOINTS AN FOIA OFFICER WITHIN HIS EXECUTIVE OFFICE; THE JURISDICTIONAL REQUIREMENTS OF FOIA ARE MET WHEN A CITIZEN SEEKING INFORMATION IN THE PURVIEW OF THE PRESIDENT REQUESTS IT OF THAT OFFICER.

This petition concerns a project of nationwide, indeed of nearly worldwide, fame. It has attracted this

public fascination because thought transparency has always been shrouded in mystery, awe, superstition, and horror, and this is the first time in human history that a telepath has been the subject of such a demonstration project. There can be no doubt that every member of the adult population of the United States, if he or she is not totally oblivious to what is going on in the world — *except your Petitioner*, from whom the facts have been concealed — knows of this project and knows, perhaps not the address, but certainly the name, of the entity conducting it. Any member of the President's Office of Administration within his Executive Office can instantly rattle off that name. Petitioner merely appeals to the Chief Executive, via his administrative support agency, to let him in on this worldwide "secret" *about him.*

In these circumstances, it is absurd for this agency to claim that it has "searched its records" and found "no records responsive to [Petitioner's] request." Will it also asseverate that it has "no records" that grass is green or the sky blue?

According to Respondent's internal regulations, any court can order the production of non-exempt information available to any employee of its office. He or she must produce, "with the prior approval of the Deputy Director," "Any information or material acquired by any person while such person is an employee of the Office of Administration as a part of the performance of his official duties or *because of his official status*" (5 CFR Ch. XV, 1-1-94 Edition, § 2502.30, emphasis added) — as would be the case in disclosing the name of a government agency conducting a project known throughout the length and breadth of the land. In Hemenway v. Hughes, 601 F.Supp. 1002 (D.D.C. 1985), a government entity claimed not to possess information

requested under FOIA, which it in fact possessed but, as here, stonewalled against disclosing. Citizens requested from the Department of State information regarding the citizenship status of persons accredited to attend its briefings. The Department claimed that it "does not maintain any such list." The plaintiff argued, exactly as Petitioner here argues, that "the information was readily available to the defendants at the time the request was made, even if it was not contained in the form of a `list.'" The court agreed that the information was readily available and must be produced:

> One need not get involved in a semantic debate over the meaning of the word "list" to understand what information the plaintiff wanted. Because the defendants had reasonably clear notice of what the plaintiff sought, the defendants had an obligation to provide any files containing citizenship information that they had, provided that the information was not covered by an exemption. Hemenway, at pp. 1004-5.

3. UNDER FOIA, NOT MERELY "RECORDS," BUT *ANY* NON-EXEMPT INFORMATION MUST BE PROVIDED THE CITIZEN REQUESTING IT.

In its opinion, the Court of Appeals, echoing the District Court, insists that FOIA "applies only to information in record form." It cites Forsham v. Harris, 445 U.S. 169, to the effect that FOIA deals with "agency records, not information in the abstract" — as if the name and address of a government agency were "abstract"! — and certain other cases preferring the term "records" to "information."

The Office of Administration's own internal regulations concerning responses to FOIA requests employ the

term "information" much more frequently than "records," and refer to the "disclosure of information" by an employee of that Office as "a part of the performance of his official duties or because of his official status" — language scarcely compatible with the production of records, but quite compatible with Petitioner's own request. 5 CFR Ch. XV (1-1-94 Edition), § 2502.30-33 (*see* detailed excerpt, Appendix E).

Indeed, the Act conferring jurisdiction upon Petitioner in this case is a "Freedom of *Information* Act," not a "freedom of records" statute; every literate person knows that "records" are merely *one kind* of information; and there is a considerable line of cases holding that FOIA entitles citizens to any sort of information — even, as explained in Hemenway v. Hughes (*supra*), a *list of names* which the agency is required to *create*. Many FOIA appeals court cases do not employ the term "records" at all, or (in some instances) mention it only in passing, preferring the term "information." Cf., for example, U.S. Department of Air Force v. Federal Labor Relations Authority, 838 F.2d 229 (7th Cir. 1988), dealing with the release by a government employer of *employees' home addresses* to the union; Deering Milliken, Inc. v. Irving, 548 F.2d 1131 (C.A.S.C. 1977); Pacheco v. Federal Bureau of Investigation, 470 F.Supp. 1091 (D.C.P.R. 1979).

Two opinions of special relevance, the first (Cazalas) from the U.S. Court of Appeals for the Fifth Circuit:

> A) The government argues that what Cazalas wanted were statements... and that no statements existed *"per se."* ... [But] *The government knew what Cazalas wanted* [emphasis added], and it is irrelevant whether they were labelled as "statements," "views," "expressions," or "opinions."... [The government

> should not be allowed] an airtight way of denying the existence of anything and everything that it wished to withhold... and then leaving it to the person requesting the documents to figure out for what to ask. Cazalas v. U.S. Dept. of Justice, 660 F.2d 612, 622 (1981).
>
> B) Defendants claim that the Act... entitled plaintiff only to receive "records"...; and that the court is only empowered to order the production of such requested records. Defendants' reading of the statute is impermissibly narrow.... A literal construction of that term ["records"] would frustrate the "basic objective" of the Act: "the full release of *information*." ... [emphasis added] Such a result cannot be tolerated, in light of Congress' intent that the government freely make non-exempt information available to the public. Diamond v. Federal Bureau of Investigation, 487 F.Supp. 774, 776-77 (D.C.N.Y. 1979).

4. UNDER FOIA, A PLAINTIFF IS ENTITLED TO SUE A DIFFERENT DEFENDANT FOR DIFFERENT INFORMATION FROM THAT REQUESTED IN A PREVIOUS FOIA SUIT WHICH WAS DISMISSED.

For several years, Petitioner has sought relief through FOIA of his *ignorance*, scrupulously maintained by those conducting the government project of which he is the subject, of the facts of his own history. He has been relegated to his own conjectures as to the identity of the agency in charge of his therapy, which still has not seen fit to release him from its ministrations.

On 22 September 1989, Petitioner filed suit under FOIA (USDC, EDLa, Civ.A. No. 89-4219), against the Administrative Assistant to the Secretary of the Army, for

"records of a therapeutic project concerning plaintiff's involuntary telepathic transmissions (thought projections) carried on by the U.S. Army...." Becoming convinced by project activities themselves that it was not the Army which was conducting the project, he moved to dismiss the suit on 20 November 1989.

Deciding that his effort to discover who was conducting the project would be best served by inquiring of the then President, but receiving no reply, petitioner on 23 January 1990 filed suit under FOIA in the same court (Civ.A. No. 90-0270) against the Director, Office of Administration, Executive Office of the President, requesting the identity of the agency in charge, still assuming that the project concerned "involuntary telepathic transmissions (`thought projections' or `thought transferences')." This suit was dismissed on grounds that it lacked jurisdiction, one reason being that "an individual officer of a federal agency is not a proper party to a FOIA action" (District judge's Memorandum and Order, entered 22 March 1990).

Three years later, petitioner, having meanwhile been led by his therapists to a full understanding of the nature of his thought transparency — that anyone anywhere at any time can read his mind, and that there are no involuntary thought projections involuntarily received — and also mindful of the District judge's admonition that under FOIA one sues the *agency*, not its director, filed the present action in the same court (Civ.A. No. 93-1402). The defendant, Respondent to the instant petition, was *not* the defendant of any previous suit; and the request was (and is) for "the name, address, and telephone number of the agency, bureau, or other entity of the U.S. government which conducts or supervises a project of psychiatric or psychological treat-

ment based upon Plaintiff's condition of thought transparency."

The Court of Appeals would have it that these distinctions are "irrelevant," since petitioner is "misusing FOIA" by not asking for "records" (but see Section 3, above). Yet it must not really find them so, since it devotes considerable space to rehearsing them, and two paragraphs at the end of its opinion to affirm the District court's warning against petitioner's filing "another FOIA complaint... which is similarly without jurisdictional basis," and ordering that "he shall include with every future complaint or pleading to be filed a list of all causes previously filed in that same, similar or related causes of action...." (This section of this petition incidentally constitutes such a list.) This implies that the Appeals court, like the District court, affects to believe that Petitioner is making a pastime of filing suit after suit requesting the same information from nearly indistinguishable defendants.

But this is not what has been happening. It is a far cry from the Assistant Secretary of the Army and a presumed Army project dealing with involuntary thought projections, to the President's executive office and a project conducted by an agency concerned with thought transparency, or the ability of others to read one's mind when they choose. The difference between a radio which you cannot shut off, blaring at you wherever you may be, and a radio station to which you can tune in when you wish, is, after all, crucial — and that is the difference between Petitioner's earlier requests for information and his present one.

Nevertheless, the District court has chosen to conflate the present lawsuit with that three years ago, and the Appeals court echoes that conflation without quite

saying so, in its warnings and its order never to file another "similar or related" action. Petitioner believes that this Court will find these warnings and censures unreasonable, predicated as they are on a reckless conflation of different suits requesting entirely different information and naming different defendants.

5. A DECISION DENYING AN FOIA REQUEST WHICH MISREPRESENTS THE INFORMATION REQUESTED SHOULD BE VACATED.

In the Introduction to its opinion, the Court of Appeals writes: "Goldgar claims that the United States government has, since the mid-1940s, been conducting therapy upon him for his `thought transparency' condition...." In his Memorandum and Order dismissing Petitioner's suit, the District judge adopts the Report and Recommendation of the Magistrate judge which states that the plaintiff seeks information "regarding the identity of the government agencies [*sic*] involved in conducting or supervising psychiatric or psychological treatment of thought transparency." In the first sentence of her Brief for Defendant/Appellee, and in similar language in every other pleading, Respondent's counsel writes that "Goldgar believes that an agency of the United States of America is conducting a project of therapy for the mental condition he calls `thought transparency.'" Respondent's FOIA officer, in her letter of 18 March 1993 denying Petitioner's request for information, calls it a request "for information regarding federal entities [*sic*] conducting projects [*sic*] on thought transparency."

In fact, *no one* opposing Petitioner's request or judging it seems to have read his repeated statements and

elucidations of the information he is seeking. Thought transparency is an innate condition, like the color of one's eyes. It cannot be treated, modified, or cured, any more than can the color of one's eyes. Once born with it, it is there to stay. And everyone knows this.

Yet Petitioner has been compelled to explain repeatedly this simple fact, each time patiently referring to his original complaint, referring to a project of psychological treatment "BASED UPON plaintiff's condition of thought transparency" (emphasis added).

Thus, in his Memorandum in Reply to Defendant's Motion to Dismiss (USDC, EDLa, 2 August 1993), Petitioner wrote: "In normal reading, `based upon' means that the thought transparency *enables the treatment to be conducted,* just as the running of an automobile engine is `based upon' the combustion of gasoline."

Again, in his Appellant's Brief (CA, 5th Cir., 24 February 1994), Petitioner wrote: "Thought transparency ... cannot be treated. Appellant has never requested such nonexistent information.... Since the distinction has been carefully drawn, as necessitated by these misreadings, in several of Appellant's pleadings, yet he is still pictured as seeking nonexistent information about a project treating a non-treatable mental condition, the District judge clearly erred in accepting it when adopting the Magistrate judge's recommendation."

Again, in his "Brief of Appellant in Reply to Brief of Appellee" (CA 5th Cir., 14 April 1994), Petitioner wrote:

> This assertion that Goldgar requests information which does not exist appears to be deliberately calculated so as to harm his case, for it has been

> repeated in virtually every pleading of counsel for the Office of Administration from the beginning, while, each time, Goldgar has replied with a perfectly lucid explanation of the error.... No government agency... would be foolish enough to conduct a project of "therapy" for this condition. Goldgar *has* been for many years, and is still, the subject of a project of psychotherapy... which *makes use of* his thought transparency condition as an *implement* which enables therapists to "see into" his thought processes for therapeutic purposes, just as a gastroenterologist employs an endoscope in order to "see into" the patient's bodily canal....

Petitioner submits that the perpetuation on all sides of this myth that he wants to locate a project which does not exist, making it appear that his request for information under FOIA is absurd, and that the endorsement of this myth by the District judge and the Appeals Court panel, causes Respondent's refusal of the information he seeks, and indeed its whole case in defense of that refusal, to fall of its own weight. He further submits that since the FOIA officer of the Office of Administration, Executive Office of the President, and all officers of federal courts who have dealt with his case have repeatedly affected not to understand the plain language of his request for information under FOIA, his request to Respondent for information and then to those courts for an order to Respondent to produce the information sought has, in reality, *never had a hearing at all*, and that therefore the denial of that request in the courts below should be vacated.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari should issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,
HARRY GOLDGAR
Counsel of Record

APPENDIXES

Are contained in the following pages.

APPENDIXES

A. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT in Harry Goldgar v. Office of Administration, Executive Office of the President, No. 93-3796, decided 18 July 1994, 26 F3d 32:

Appeal from the United States District Court for the Eastern District of Louuisiana.

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:

Introduction

Plaintiff-Appellant Harry Goldgar is appealing the dismissal of his *pro se* civil lawsuit brought under the Freedom of Information Act ("FOIA").[1] Goldgar, 73, states in his brief that he is a "telepath" and "has an innate condition of thought transparency, enabling any person anywhere at any time who so chooses to read his mind." Goldgar claims that the United States government has, since the mid-1940s, been conducting therapy upon him for his "thought transparency" condition without telling him about such therapy. By filing and pursuing this FOIA action against the Office of Administration, Executive Office of the President ("OA-EOP"), Goldgar seeks to obtain "the name and address of the U.S. government agency which has conducted his treatment so that he can plead his case for release."

The trial court, following the magistrate's recommendation, entered an order dismissing Goldgar's action for failure to meet the jurisdictional requirements under the

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[1] 5 U.S.C. § 552 (West 1977 & Supp. 1994).

FOIA.[2] See *Goldgar v. Office of Admin., Executive Office of the President*, No. CIV.A. 93-1402, 1993 WL 370620 at *2 (E.D.La., Sept. 10, 1993) (unpublished). We AFFIRM the decision of the trial court.

Standard of Review

We review a dismissal for lack of subject matter jurisdiction *de novo* under 5 U.S.C. § 552(a)(4)(B). We hold that because the OA-EOP does not have any records responsive to Goldgar's request, it has not "improperly withheld" agency "records," and thus Goldgar did not meet the jurisdictional requirements of the Freedom of Information Act. *See, e.g., Morris v. Department of Justice*, 540 F.Supp. 898, 900 (S.D.Tex.1982), *aff'd*, 696 F.2d 994 (5th Cir.)(TABLE), *cert. denied*, 460 U.S. 1093, 103 S.Ct. 1794, 76 L.Ed.2d 360 (1983).

Facts and Procedural History

Goldgar commenced this action against the OA-EOP after the agency failed to comply with his FOI request for

> "the name, address, and telephone number of the agency, bureau, or other entity of the U.S. Government which conducts or supervises a project of psychiatric or psychological treatment based upon Plaintiff's condition of thought transparency, and the name of the director of the project."

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[2] On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, *has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.*" 5 U.S.C. § 552(a)(4)(B) (Emphasis added).

The FOIA officer for the OA-EOP responded to Goldgar's request indicating that the agency had "no records responsive to [his] request." Goldgar appealed this denial to the deputy director of the OA-EOP, who reviewed the request and reaffirmed the decision of the FOIA officer. Goldgar filed suit in federal court to force production of the information sought.

The district court dismissed the complaint because: (1) it failed to allege that the OA-EOP had improperly withheld agency records such as to give the court jurisdiction over the matter, and (2) it was harassing. We will examine each rationale.

Jurisdictional Issue: No Improper Withholding of Records

Jurisdiction in a FOIA suit is based upon the plaintiff's showing that an agency has (1) improperly (2) withheld (3) agency records. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150, 100 S.Ct. 960, 968, 63 L.Ed.2d 267 (1980). The plaintiff has the initial burden of establishing that the court has jurisdiction over his claims. See Federal Rule of Civil Procedure 8(a)(1); *Morris*, 540 F.Supp. at 900. Plaintiffs who do not allege any improper withholding of agency records fail to state a claim for which a court has jurisdiction under FOIA. *Cf. National Federation of Federal Employees v. United States*, 695 F.Supp. 1196, 1204 (D.D.C.1988). It is the agency's burden to prove the non-existence of the records sought, and we hold that the OA-EOP met this burden. The OA-EOP did not improperly withhold any "agency recods." Upon receipt of Goldgar's letter, the FOIA officer conducted a thorough search of the agency's records and determined that "there were no

records responsive to [his] request." The OA-EOP deputy director affirmed this response.

Goldgar argues that he is not seeking agency "records," but only "information" readily available to the OA-EOP. He also contends that "his fame as a telepath and as subject of this government therapeutic project is so widespread that virtually every reasonably well informed adult citizen in the United States possesses the information he seeks," and thus, "it is inconceivable that any officer of the federal government could lack the information."

The distinction that Goldgar attempts to make between "information" and "records" does not advance his case; in fact, such a distinction supports the trial court's dismissal of his suit, because the FOIA applies only to information in record form. "The Freedom of Information Act deals with agency `records,' not information in the abstract," *Forsham v. Harris*, 445 U.S. 169, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980). In *Kissinger*, the Supreme Court said:

> The act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained. It has been settled by decision of this Court that only the Federal Records Act, and not the FOIA, requires an agency to actually create records, even though the agency's failure to do so deprives the public of information which might have otherwise been available to it.

Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152, 100 S.Ct. 960, 969, 63 L.Ed.2d 267 (1980) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-162, 95 S.Ct. 1504, 1521-22, 44 L.Ed.2d 29 (1975); *Renegotiation Bd. v.*

Grumman Aircraft Eng. Corp., 421 U.S. 168, 192, 95 S.Ct. 1491, 1504, 44 L.Ed. 57 (1975)). Thus, the FOIA merely affords the public free access to "records" which contain information within the control of the agency at the time of the FOIA request. *United States Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 145, 109 S.Ct. 2841, 2848, 106 L.Ed.2d 112 (1989). In this case, the OA-EOP had no records in its control responsive to Goldgar's request, so Goldgar did not establish jurisdiction under the Freedom of Information Act.

In *Morris*, 540 F.Supp. at 900, the plaintiff requested certain records from the Veterans Administration. The court held that the plaintiff had failed to establish jurisdiction:

> "[A]ll records and documents prepared or created which the Veterans Administration maintains on the plaintiff have been disclosed to his attorney upon plaintiff's request. In as much as all records or documents have been disclosed, there exists no "improperly withheld records" within the meaning of § 552(a)(4)(B)... and thus no denial of access upon which jurisdiction can be invoked. In the absence of records "improperly withheld," this action must be dismissed for want of subject matter jurisdiction under the FOIA."

Morris, 540 F.Supp. at 900.

The FOIA was enacted to afford the public greater access to government "records." *Department of Air Force v. Rose*, 425 U.S. 352, 365-66, 96 S.Ct. 1592, 1601-02, 48 L.Ed.2d 11 (1976). If Goldgar is not seeking an agency record — the only thing accessible under the FOIA — then he is abusing and misusing the FOIA. If he is seeking a record, we hold that no such record exists and that Goldgar has failed to

state a claim under the FOIA which could confer jurisdiction on the federal district court.

Dismissal Because Claim was "Harassing"

Goldgar has sought similar information in two prior lawsuits. The first action was *Harry Goldgar v. Administrative Assistant to the Secretary, Department of the Army*, No. 89-4219. Goldgar voluntarily dismissed that action and brought a second FOIA action against the director of the Office of Administration, Executive Office of the President. That lawsuit was very similar to the case we now review; it also sought records under the FOIA that the agency did not have, and it also was dismissed for lack of jurisdiction. *See Harry Goldgar v. Office of Administration, Executive Office of the President* [*sic*; Defendant named was "*Director*, Office of Administration..." — Petitioner's note], No. CIV.A.90-270, 1990 WL 32893 at *1 (E.D.La., March 22, 1990) (unpublished).

In his brief, Goldgar attempts to distinguish the present case from his two prior FOIA lawsuits. In the voluntarily dismissed 1989 action, Goldgar sued the Administrative Assistant of the Department of the Army for requested records of a "therapeutic project" concerning "involuntary telepathic transmissions (thought projections)." The 1990 suit sought records and/or information on "thought projections" or "thought transferences," but the present suit, Goldgar explains, seeks information on "thought transparency." In the 1990 suit, Goldgar improperly named the director of the OA-EOP as a defendant; he points out that the present suit is different because it names the OA-EOP agency itself.

We hold that these distinctions are irrelevant because the repetition comes from misusing the FOIA. Even

Goldgar admits that his lawsuits have asked not for existing records but for "information." The information he seeks — the identity of the government agency that is reading his mind — does not exist in record form and cannot be produced.

Therefore, we AFFIRM the district court's dismissal of Goldgar's suit with prejudice for failure to meet the jurisdictional requirements of the FOIA. Further, we AFFIRM the district court's order that Goldgar familiarize himself with Rule 11 of the Federal rules of Civil Procedure. We join the district court in warning Goldgar that should he file or appeal another FOIA complaint against any federal agency, office or department which is similarly without jurisdictional basis, he may be assessed costs, attorney's fees and proper sanctions.[3]

We AFFIRM the district court's order that all future complaints and pleadings presented by Goldgar, whether pro se or through counsel, shall be verified by him prior to submission and filing with the district court, and that he shall include with every future complaint or pleading to be

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[3] A federal court may structure sanctions necessary or warranted to control its docket and maintain the orderly administration of justice. We warn Goldgar in addition that if he persists in filing FOIA suits without a proper jurisdictional basis, he may be ordered to obtain judicial pre-approval of all future filings. *See, e.g., Vinson v. Heckmann*, 940 F.2d 114, 116-17 (5th Cir. 1991) (ordering all trial and appellate courts within the Fifth Circuit's supervisory jurisdiction to decline acceptance of any filing from frivolous litigant unless he obtained specific pre-authorization by a judge of the forum court); *Moody v. Miller*, 864 F.2d 1178, 1179 n. 2 (5th Cir. 1989) (noting our decision to prohibit frivolous litigant from prosecuting any more *in forma pauperis* appeals until he paid all previous sanctions or obtained certification of his good faith by the district court).

filed a list of all causes previously filed on the same, similar or related causes of action and include therein a brief statement regarding the court's ruling in that previous action.

Finally, we AFFIRM the district court's order that Goldgar notify any counsel retained in the future of these stipulations and that any failure of compliance may result in the dismissal of the action and/or the appropriate sanctions.

AFFIRMED.

B. MEMORANDUM AND ORDER, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, in Harry Goldgar v. Office of Administration, Executive Office of the President, Civ.A. No. 93-1402, entered 8 October 1993.

The Report of Magistrate Judge Ivan L.R. Lemelle, which contains his findings of fact and recommendations for the disposition of this action, has been presented for consideration. Having made a *de novo* review of the objections raised by the plaintiff to the Report and Recommendation, the Court is of the opinion that the findings and conclusions of the Magistrate are correct, and the objections of the plaintiff are without merit. I therefore adopt the report of the United States Magistrate as the findings and conclusions of the Court. 28 U.S.C. § 636(b) (1) (C).

Accordingly,

IT IS ORDERED that the motion to dismiss filed by the Office of Administration, Executive Office of the President is GRANTED and that plaintiff's action under 5 U.S.C. § 552 (a) (4) (B), otherwise known as the Freedom of Information Act, is DISMISSED WITH PREJUDICE for failure to meet the jurisdictional requirements.

IT IS FURTHER ORDERED that plaintiff familiarize

himself with Rule 11 of the Federal Rules of Civil Procedure, as well as the concepts of claim preclusion. The plaintiff is admonished, warned, and advised that, should he file another complaint under the Freedom of Information Act in this court against the Office of Administration, Executive Office of the President, or any other federal agency, office, or department, which is found to be without jurisdictional basis, he may be cast with costs and attorney's fees, and sanctioned appropriately.

IT IS FURTHER ORDERED that all further complaints and pleadings presented by plaintiff, whether pro se or through counsel, shall be verified by him prior to submission and filing with the United States District Court for the Eastern District of Louisiana, and that he shall include with every future complaint or pleading to be filed a list of all causes previously filed on that same, similar, or related causes of action and include therein a brief statement regarding the Court's ruling in that previous action.

IT IS FURTHER ORDERED that plaintiff notify any counsel retained in the future of this order, and that failure to do so, or to otherwise comply with the order itself may result in the dismissal of the action and/or the appropriate sanctions.

(signed)
MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

C. REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, in Harry Goldgar v. Office of Administration, Executive Office of the President, Civ.A. No. 93-1402, entered 13 September 1993:

Plaintiff, Harry Goldgar, filed this *pro se* civil action seeking certain information under 5 U.S.C. § 552 (a)(4)(B), otherwise known as the Freedom of Information Act ("the FOIA"). In his complaint, plaintiff has sued the Office of Administration, Executive Office of the President ("Office of Administration") alleging that he has made several unsuccessful attempts to obtain information known personally by the President of the United States regarding the identity of government agencies involved in conducting or supervising psychiatric or psychological treatment of thought transparency.

According to the complaint and its attachments, plaintiff wrote the President on February 1, 1993, requesting under the FOIA, "the name, address, and telephone number of the federal agency, bureau, or other entity which conducts or supervises this project, and the name of the director of the project." (Compl. Exh. A). Plaintiff claims he received no response.

He thereafter wrote to the Office of Administration on March 9, 1993 requesting the same information. (Compl. Exh. B). He received a response dated March 8 [*sic* for March 18], 1993 from Ms. Stacia L. Cropper, the FOIA officer at the Office of Administration, who described the purpose and functions of the Office of Administration. The letter also indicates that the agency has "no records responsive to your request." (Compl. Exh. C).

On April 1, 1993, plaintiff apparently appealed the March 8 [*sic*] decision to the Director [*sic* for Deputy Director] of the Office of Administration. In her response, the Director [*sic*] also reiterated the purposes and functions of the Office of Administration and affirmed the prior response. (Compl. Exh. E). In refusing to accept these re-

sponses, plaintiff has now filed suit in this Court to force the production of the information sought.

On June 11, 1993, the United States filed a motion to dismiss, presumably under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, although the jurisdictional basis for the motion is not stated. In the motion, the United States alleged that plaintiff's complaint is harassing and fails to allege that an agency had improperly withheld documents such to give this Court jurisdiction over the matter. In his opposition, plaintiff averred that the motion should be denied because he does not seek "records" but rather the identity of a government or related agency, an identity which is "known to the whole public" and the President from whom he really seeks his answer.

The FOIA was enacted to afford the public greater access to government records. *Department of Air Force v. Rose*, 425 U.S. 352, 365-66, 96 S.Ct. 1592, 1601 (1976). As plaintiff has been instructed before, an agency record is a compilation of information which together comprises a "record" from which information may be provided under the FOIA. The Supreme Court has recognized, however, that the FOIA does not compel that an agency create a record for purposes of response to a FOIA request. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 100 S.Ct. 960 (1980); *Forsham v. Harris*, 445 U.S. 169, 1200 S.Ct. 977 (1980). "The Freedom of Information Act deals with `agency records,' not information in the abstract," *Forsham*, 445 U.S. at 152, 100 S.Ct. at 969. Thus, the FOIA affords the public free access to "records" which contain information within the control of the agency at the time of the FOIA request. *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 109 S.Ct. 2841 (1989).

In order to confer jurisdiction on a federal district court, a plaintiff must establish "a showing that an agency has (1) `improperly' (2) `withheld' (3) `agency records.'" *Kissinger*, 445 U.S. at 150, 100 S.Ct. at 968; *Tax Analysts*, 492 U.S. at 142, 109 S.Ct. at 2846. The agency has the burden of establishing that the materials sought are not agency records or have not been improperly withheld. *See Tax Analysts*, 492 U.S. at 142 n. 3, 109 S.Ct. at 2846 n.3.

In the instant matter, plaintiff has once again attempted to distinguish between the technical phrase "information" and the statutory phrase "records" in an attempt to avoid his burden of proof before this Court. For purposes of the FOIA, there appears no difference in application. The term record, though not statutorily defined, has been judicially accepted as a compilation of materials or information in the possession of a given agency. The information plaintiff requests must be a part of the agency's records in order for him to have a right to retrieve it under the FOIA. If plaintiff is not seeking an agency record, the only thing accessible under the FOIA, then he is necessarily abusing and misusing the FOIA.

Even if plaintiff is proceeding under the FOIA properly, he has failed to bring a claim under the FOIA which confers jurisdiction on this Court. As was also held, in one of plaintiff's prior related petitions (discussed *infra*), he has not initially established that the information sought is contained within the records of the Office of Administration or that it was wrongfully withheld from him so as to confer jurisdiction on this Court. While it may be the agency's burden to prove the non-existence of the records, it is the plaintiff's burden to set forth the Court's jurisdictional basis. Plaintiff's complaint therefore should be dismissed for

failure to meet the jurisdictional requirements under the FOIA.

In the course of addressing the instant motion, the Court has noted two prior attempts by plaintiff to obtain the exact same information, no matter how he attempts to mask his request or hide behind semantics. His first attempt to obtain "the name, address, and telephone number of the federal agency, bureau, or other entity conducting or supervising psychiatric or psychological treatment of thought transparency," or some derivation thereof in this Court came in *Harry Goldgar v. United States Department of the Army* [*sic* for "Administrative Assistant to the Secretary, Department of the Army"], C.A. 89-4219"D"(5), which was filed on September 22, 1989. In that petition, Goldgar urged his request under the FOIA alleging that the Army had not provided the information as requested above [*sic* for what was actually requested: "all records of a therapeutic project concerning Plaintiff's involuntary telepathic transmissions (thought projections), carried on by the U.S. Army or one of its branches or subdivisions..."]. Not long after filing, plaintiff filed a motion for voluntary dismissal which was granted on November 20, 1989.

Goldgar returned a few months later with another request under the FOIA entitled *Harry Goldgar v. Director, Office of Administration, Executive Office of the President*, C.A. 90-0270"G"(1). But for the name and dates, the complaint reads like the instant complaint. The matter was dismissed with prejudice on March 22, 1993 [*sic* for "1990"], on motion of the government. The District Judge found that plaintiff had failed, as here, to meet the jurisdictional requirements needed to pursue a civil action in this Court under the FOIA.

It seems that plaintiff is convinced that almost everyone in the country, citizen or government agent, knows the information he is requesting and is secreting it from him. While the Court does not comment on plaintiff's apparent paranoia, it is incumbent on the Court to curtail what appears to be the beginnings of repetitive and duplicative litigation. Accordingly, it will be recommended that plaintiff be appropriately admonished.

RECOMMENDATION

It is therefore RECOMMENDED that the motion to dismiss be GRANTED and that plaintiff's complaint be DISMISSED WITH PREJUDICE for failure to meet the jurisdictional requirements.

It is further RECOMMENDED that the Court caution plaintiff, Harry Goldgar, to familiarize himself with Rule 11 of the Federal Rules of Civil Procedure, as well as the concepts of claim preclusion.[1] The plaintiff should also be

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[1] Collateral estoppel or claim preclusion prohibits a party from disputing in a subsequent proceeding against the same parties, or their privies, a right, question, or fact previously resolved. *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27 (1897); *Sidaq Aktiengesellschaft v. Smoked Foods Products Co., Inc.*, 776 F.2d 1270, 1275 (5th Cir. 1985); *Key v. Wise*, 629 F.2d 1049, 1061 (5th Cir. 1980), *reh'g denied*, 645 F. 2d 72 (5th Cir.), *cert. denied*, 454 U.S. 1003, 102 S.Ct. 682 (1981). Collateral estoppel may also be asserted when a defendant seeks to prevent a plaintiff from asserting a claim which was previously litigated in an action against other defendants. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 4, 99 S.,Ct. 645, 649 n. 4 (1979); *Witherspoon v. United States*, 838 F.2d 803, 806 (5th Cir.), *cert. denied*, 488 U.S. 858, 109 S.Ct. 150 (1988). Thus, it is not necessary that the same parties appear in both actions as long as the plaintiff had a fair opportunity to litigate the claim itself. *Thurston v. United States*, 810 F.2d 438, 445 (4th Cir. 1987) (*citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434 (1971)).

admonished that, should he file another complaint under the FOIA in this Court, against this or any other federal agency, which is found to be without jurisdictional basis, he may be cast with costs and attorney's fees, and sanctioned appropriately.

It is further RECOMMENDED that an order be issued notifying Harry Goldgar that all future pleadings, petitions, or complaints, whether *pro se* or through counsel, shall be verified by him prior to submission and filing with the United States District Court for the Eastern District of Louisiana, and that he shall include with every future complaint or pleading to be filed a list of all causes previously filed on that same, similar, or related causes of action and include therein a brief statement regarding the Court's ruling in that previous action.

It is further RECOMMENDED that Harry Goldgar be charged with the responsibility to notify any future retained counsel of the issuance of this order, and that failure to do so, or to otherwise comply with the order itself, may result in the dismissal of the action and/or the appropriate sanctions.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its service precludes a party from attacking the factual findings on appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466 (1985); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana,
this 10th day of September, 1993.
(signed) Ivan L.R. Lemelle
UNITED STATES MAGISTRATE JUDGE

D. ORDER ON PETITION FOR REHEARING, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, in Harry Goldgar v. Office of Administration, Executive Office of the President, No. 93-3796, filed August 1, 1994.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(August 1, 1994)

Before GARWOOD, SMITH and DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

(signed) Harold R. DeMoss

United States Circuit Judge

E. CONSTITUTION, STATUTE, AND REGULATIONS:

1. *United States Constitution, Amendment I*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. *Freedom of Information Act, 5 U.S.C. § 552 (in part)*

(a) Each agency shall make available to the public information as follows:

. . . . . .

(a)(3) Except with respect to the records made

available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed, shall make the records promptly available to any person.

. . . . . .

(a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

. . . . . .

(f) For purposes of this section, the term "agency" as defined in section 555(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

3. *5 CFR Ch. XV (1-1-94 Edition) — Office of Administration, Executive Office of the President — Subpart B: Production* (under FOIA) *in Response to Subpoenas or Demands of*

Courts or Other Authorities (in part):

§ 2502.30 Purpose and scope.

This subpart contains the regulations of the Office concerning procedures to be followed when a subpoena, order or other demand (hereinafter in this subpart referred to as a "demand") of a court or other authority is issued for the production or disclosure of:

(a) Any material contained in the files of the Office of Administration;

(b) Any information relating to material contained in the files of the Office; or

(c) Any information or material acquired by any person while such person as [*sic*] an employee of the Office of Administration as a part of the performance of his official duties or because of his official status.

§ 2502.31 Production prohibited unless approved by the Deputy Director.

No employee or former employee of the Office of Administration shall, in response to a demand of a court or other authority, produce any material contained in the files of the Office of Administration or disclose any information or produce any material acquired as part of the performance of his official status without the prior approval of the Deputy Director.

§ 2502.32 Procedure in the event of a demand for disclosure.

(a) Whenever a demand is made upon an employee or former employee of the Office of Administration for the production of material or the disclosure of information described in § 2502.31, he shall immediately notify the Deputy Director.... [who will issue instructions].